

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

SERITAGE SRC FINANCE LLC,
Plaintiff,

v.

PAINTED TREE SAN ANTONIO, LLC and
PAINTED TREE MARKETPLACE, LLC
Defendants.

Civil Action No.

**COMPLAINT FOR BREACH OF
COMMERCIAL LEASE AND GUARANTY**

Plaintiff, Seritage SRC Finance LLC (“Plaintiff” or “Landlord”), by way of complaint for breach of a commercial lease and guaranty, by and through its attorneys, Cole Schotz P.C., against Defendant Painted Tree San Antonio, LLC (“Painted Tree” or “Tenant”) and Defendant Painted Tree Marketplace, LLC (“Painted Tree Marketplace” or “Guarantor”) (collectively, “Defendants”), states and alleges as follows:

NATURE OF ACTION

1. Plaintiff brings this action to remedy breaches of lease and guaranty agreements committed by Defendants, which have caused Plaintiff to suffer injury and damages.

THE PARTIES

2. Plaintiff is a Delaware limited liability company with a principal place of business at 500 Fifth Avenue, Suite 1530, New York, New York, 10110.

3. Painted Tree is a Texas limited liability company with a principal place of business at 15400 Chenal Parkway, Suite 200, Little Rock, Arkansas, 72211 and can be served through its registered agent CT Corporation System at 1999 Bryan Street, Suite 900, Dallas, Texas 75201.

4. Defendant, Painted Tree Marketplace, LLC, is an Arkansas limited liability company with a principal place of business at 15400 Chenal Parkway, Suite 200, Little Rock, Arkansas, 72211 and can be served through its registered agent Michael Cavallo at 24351 I-30, Bryant, Arkansas 72022.

JURISDICTION AND VENUE

5. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because, as noted above, complete diversity of citizenship exists between Plaintiff, on the one hand, and Defendants, on the other hand, and because the amount in controversy exceed \$75,000.00, exclusive of interests and costs.

6. This Court has personal jurisdiction over Defendants because, among other things, Defendants do business in the State of Texas and in this judicial district, including through maintenance of a principal place of business at the Park North Shopping Center, 842 Northwest Loop 410, San Antonio, Texas 78216, and acts complained of herein occurred in the State of Texas and in this judicial district.

7. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and (c) because the acts complained of occurred in this district, and Defendants either reside in this district or have substantial and continuous ties to this district.

FACTUAL ALLEGATIONS

A. The Lease and Guaranty

8. On or about June 28, 2019, Painted Tree, as Tenant, entered into a commercial lease agreement (the “Lease”), with Plaintiff, as Landlord, for certain real property known as Park North, San Antonio, Texas (the “Premises”). A true copy of the Lease is attached and incorporated as **Exhibit A**.

9. The initial term of the Lease is ten (10) years. The Lease provides for one (1) renewal term of five (5) years, exercisable provided that among other things Tenant is operating at the Premises and not in default under the Lease.

10. Pursuant to the Lease, Tenant is required to pay, among other things, rent, taxes and common area expenses in monthly installments. Rent for lease years one through five is \$416,193.15 per annum and for years six through ten is \$457,995.81 per annum.

11. Upon default, Tenant must pay Landlord interest on amounts due but not paid, interest at eighteen (18%) percent per annum or the maximum interest permitted by law, whichever is lower, and Landlord's enforcement costs, including Landlord's attorney's fees and costs.

12. Pursuant to Lease Section 16.04, Agreed Final Damages, Tenant agreed that if Landlord elects, Tenant shall pay Landlord on demand as liquidated, agreed final damages, the rent, additional rent and all other charges that would have been payable by Tenant from the demand to the date the lease would have expired if it had not been terminated (here, ten (10) years), discounted to present value by a factor of four (4%) percent. Landlord notified Tenant of its intention to seek Agreed Final Damages under the Lease and hereby demands that Tenant remit Agreed Final Damages pursuant to the Lease.

13. Defendant, Painted Tree Marketplace, LLC (the "Guarantor"), is the guarantor of the Lease pursuant to a written Guaranty. *See* Exhibit A, Lease Section 19.36. Pursuant to the Guaranty, the Guarantor agreed to guarantee, absolutely and unconditionally, to Landlord the full and prompt payment of rent, additional rent and other charges and sums (including, without limitation, Landlord's legal expenses and reasonable attorneys' fees and disbursements) payable

by Tenant under the Lease, as well as the full and timely performance and observance of all the covenants, terms and conditions of the Lease.

B. Tenant's Default Under the Lease and Guarantor's Default Under the Guaranty

14. Tenant is in breach of its obligations to perform work, open or commence paying rent under the Lease.

15. Landlord delivered possession of the Demised Premises to Tenant on or about February 21, 2020. Under the Lease, Tenant thereafter was to take possession, perform Tenant's work, open and commence paying rent.

16. On July 31, 2020, Landlord notified Tenant of its default under the Lease for refusal to take possession of the Demised Premises and failure to pay Security pursuant to the Lease. A true copy of the Landlord's July 31, 2020 demand is attached and incorporated as **Exhibit B**.

17. On December 1, 2020, Landlord notified Tenant, and, Painted Tree Marketplace, LLC, as Guarantor, of Tenant's default under the Lease for its failure to perform work, open or commence payment of rent as required pursuant to the Lease. A true copy of the Landlord's December 1, 2020 demand is attached and incorporated as **Exhibit C**.

18. To date, Tenant has failed and refused to cure its defaults under the Lease and Guarantor has failed and refused to cure Tenant's defaults under the Lease. Rent, taxes, common area expenses and interest are accruing, and Landlord is incurring attorney's fees and costs as a result of Tenant's continuing defaults under the Lease.

19. Tenant's failure to cure its defaults as set forth in Landlord's July 31, 2020 and December 1, 2020 notices of default to Tenant are events of default under the Lease.

20. Tenant's default under the Lease has caused, and will continue to cause, Plaintiff substantial damage, all of which Plaintiff will seek to recover in its final judgment as additional amounts become due and are not paid by Tenant.

21. Lease Section 16.04 provides for an accelerated rent remedy that provides that Tenant on demand must pay as liquidated damages all rent, additional rent and all other charges that would have been payable by Tenant as of that date through Lease termination, discounted to present value by a factor of four (4%) percent. Landlord notified Tenant of its intention to seek Agreed Final Damages under the Lease, which Tenant ignored, and Landlord hereby demands that Tenant remit Agreed Final Damages pursuant to the Lease.

22. Defendant, Painted Tree Marketplace, LLC, as guarantor, is jointly and severally liable for Tenant's defaults and all of Plaintiff's losses.

FIRST COUNT
(Breach of Lease and Guaranty)

23. Plaintiff repeats and realleges the allegations contained in the preceding paragraphs of the Complaint as if set forth at length herein.

24. Plaintiff and Painted Tree are parties to the Lease, pursuant to which Painted Tree was obligated to perform Tenant work, open and to pay, among other things, rent, taxes and common area expenses.

25. The Lease constitutes a valid, binding and enforceable contract between the parties.

26. Notwithstanding its obligations under the Lease, Painted Tree has failed and refused to perform Tenant work, open or commence paying rent, all of which constitute material breaches of the Lease.

27. As a direct and proximate result of Defendant's breaches of the Lease, Plaintiff has suffered, and will continue to suffer, substantial monetary and other damage.

28. Lease Section 16.04 provides for an accelerated rent remedy that provides Tenant on demand must pay as unliquidated damages all rent through Lease termination, additional rent and all other charges that would have been payable by Tenant as of that date, discounted to present value by a factor of four (4%) percent. Landlord notified Tenant of its intention to seek Agreed Final Damages under the Lease, which Tenant ignored, and Landlord hereby demands that Tenant remit Agreed Final Damages pursuant to the Lease.

29. Defendant, Painted Tree Marketplace, LLC, as Guarantor, is jointly and severally liable for all of Plaintiff's losses herein.

SECOND COUNT
(Attorneys' Fees)

30. Plaintiff repeats and realleges the allegations contained in the preceding paragraphs of the Complaint as if set forth at length herein.

31. Plaintiff has found it necessary to engage the law firm of Cole Schotz P.C. to prosecute this action and to protect its rights. Pursuant to the terms of the Lease, Plaintiff is entitled to recover its reasonable and necessary attorneys' fees incurred in the prosecution of this action.

CONDITIONS PRECEDENT

32. Plaintiff has satisfied all conditions precedent for bringing this action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff hereby demands judgment against Defendants as follows:

- (a) Compensatory, consequential, and incidental damages;
- (b) Agreed Final Rent pursuant to Lease Section 16.04;

- (c) Pre- and post-judgment interest;
- (d) Attorneys' fees and costs of suit; and
- (e) Such other and further relief as the Court deems just and equitable.

Dated: February 11, 2021

Respectfully submitted,

/s/ Aaron Davidson

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